IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO: HAA 24 OF 2016

BETWEEN	:	MOHAMMED ZOHIT KHAN
		Appellant
AND	:	STATE
		Respondent
Counsel	:	**Ms. Jowen Singh for Appellant**
		Mr. A. Datt for the Respondent
Date of Hearing	:	**19th October, 2016**
Date of Ruling	:	**24th October, 2016**

JUDGMENT

Introduction

1. The Appellant was charged with one count of Theft contrary to Section 291 of the Crimes Decree 2009.

2. He was convicted after a fully defended trial and was sentenced on 27th May, 2016 to 18 months' imprisonment without a non parole period being set.

Grounds of Appeal

3. Being dissatisfied with his sentence, Appellant filed this timely appeal on the following grounds:

a. That the conviction is harsh and excessive having regard to all the circumstances of the case.

b. That the Learned Trial Magistrate erred in Law in fact in failing and/or neglecting to properly consider all mitigation factors before convicting the Accused.

c. That the Learned Trial Magistrate erred in Law in fact in failing and/or neglecting to take into account the personal circumstances of the Accused that lead to the Commission of the offence.

d. That the sentence passed by the Learned Trial Magistrate is not consistent with the sentences passed in cases of similar nature and therefore wrong in principle.

e. That the Learned Trial Magistrate erred in law when he failed to consider Section 4(1) and 4(2)(b) of the Sentencing and Penalties Decree 2009.

f. That the Learned Trial Magistrate erred in law when he failed to consider that the Appellant was a first offender, and that he was entitled for a suspended sentence.

g. That the Learned Trial Magistrate had erred in law and fact when he took into account the elements of the offence itself as aggravating factors.

h. That the Learned Magistrate had erred in law and fact when taking into when it did not consider Section 15(3) and 16(1) and Section 45 of the Sentencing and Penalties Decree 2009.

Law

4. In ***Bae v State*** [1999] FJCA 21; AAU0015u.98s (26 February 1999) it was observed:

> *"It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising*

its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499)".

4. The Supreme Court, in ***Naisua v State*** [2013] FJSC 14; CAV0010.2013 (20 November 2013), endorsed the views expressed in ***Bae*** *(supra):*

> *"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No. AAU0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*
>
> *(i) Acted upon a wrong principle;*
>
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
>
> *(iii) Mistook the facts;*
>
> *(iv) Failed to take into account some relevant consideration.*

6. According to the evidence accepted by the learned Magistrate, the Appellant, whilst being an employee as a cashier and bowser attendant had received money from customers who had come to the service station where he was employed. Accused at the end of his shift was supposed to deposit the days' collection in a locker to which he was the only person who had the key. He was supposed to deliver the money and the deposit book to a female staff (PW.2) on the following day. He took $ 800 from the days' collection and informed PW2 that someone had stolen money from his locker. He informed the manager (PW1) that he had given the keys to the person who replaced him during the change in shift and forgot to take it back. The matter was reported to police and the accused was arrested. He was interviewed under caution where he admitted committing the offence.

Analysis

Sentence is harsh and excessive/ Wrong principles applied in sentencing

7. Maximum sentence for Theft is 10 years' imprisonment.

8. For a first offender, the accepted tariff for a simple theft is 2-9 months' imprisonment. In ***Ratusili v State*** [2012] FJHC 1249; HAA 011.2012 (1 August 2012) Justice Paul Madigan analyzed previous case authorities and set the tariff for Theft. His Lordship identified the tariff for simple theft as between 2-9 months. His Lordship suggested that any subsequent theft offending should attract a penalty of at least 9 months. Further, theft of large sums of money and theft in breach of trust, whether first offence or not can attract sentence up to 3 years. Planned theft will attract greater sentence than opportunistic theft.

9. The learned Magistrate cited two guideline judgments; ***State v Saukilagi*** [2005] FJHC 13 ***Waqa v State*** [HAA 0017 of 2015] in selecting the tariff and the staring point. In ***Sakilagi***, *(supra)* tariff of 2-9 months' imprisonment for simple Larceny for first offenders and 9-24 months' imprisonment for subsequent convictions had been prescribed. In ***Waqa*** *(supra)* 4 months to 3 years' imprisonment for Theft had been prescribed. According to these guideline judgments, final sentence would depend on the value of the goods stolen, circumstances including the *modus operand* of the stealing and the relationship between the accused and the victim. In cases of Larceny of large amounts of money sentences of 18 months to 3 years' imprisonment had been upheld.

10. Having cited the above mentioned authorities, learned Magistrate in paragraphs 7 and 8 stated the following:

> *"When considering the nature and circumstances of offending in this matter, I consider the offending in this case to be more fraud related than a simple theft matter. That being the position, the tariff would be one of 18 months' – 3 years' imprisonment"..*
>
> *"I Therefore commence your sentence at 18 months' imprisonment".*

11. The Appellant's contention is that the learned Magistrate erred in selecting a starting point of 18 months' imprisonment. He asserts that the learned Magistrate's consideration of fraud related offences in picking the starting point is extraneous.

12. In ***Koroivuki v State*** [2013] FJCA 15; AAU0018.2010 (5 March 2013) Justice Gounder observed:

> *"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range".*

13. Although the learned Magistrate had considered the offending to be more fraud related than a simple theft matter he had not applied the tariff prescribed for the offence of Fraud. The guidelines cited by the learned Magistrate recommended a tariff of 18 months to 3 years' imprisonment where a large amount of money had been stolen. Appellant had stolen a sum of $ 800 which cannot be categorized as a large amount of money. However, that is not the only consideration that matters in selecting the staring point. Appellant and the victim were in an employer-employee relationship at the time of the offence and, by stealing from the employer in the course of the employment, Appellant had breached the trust reposed in him. Therefore, in view of the ***Ratusili*** guideline, this is not a simple theft case and the learned Magistrates' selection of the starting point of 18 months is not obnoxious to accepted sentencing principles.

14. Having selected the starting point, the learned Magistrate correctly proceeded to consider the aggravating and mitigating circumstances. He took into consideration the following mitigating factors and discounted four months.

- Accused is a first offender
- He sought forgiveness and requested for leniency.
- Accused's personal and family background.

15. The Appellant having cited ***State v Saukilagi*** [2005] FJHC where a discount of 18 months had been given on account of accused being the first offender argues that the four months' deduction given by the learned Magistrate is quite inadequate. It should be noted that there are material differences between the factual scenarios of two cases and therefore, application of sentencing principles of ***Saukilagi*** to the present case is not warranted.

16. The learned Magistrate took into consideration the following aggravating factors in increasing the the sentence by four months.

- Breach of trust in an employer –employee relationship
- Pre planning
- Benefit derived from the theft.

17. The Appellant asserts that the notion of pre-plaining is an essential element of the offence of Theft and the learned Magistrate's consideration of pre-planning as an aggravating factor is wrong in principle. Intention of permanently depriving of another's property can be formed at a spur of the moment without any pre-planning. Therefore, the argument that pre-planning is an essential element of the offence of Theft is not tenable.

18. The theft had been committed to set off a loan. There was a degree of planning involved in the offence. Further, Appellant had lied to hide the offence and attempted to put the blame on one of his co-workers. Appellant had not shown any remorse or repentance. No restitution was done. Therefore, a higher sentence than that for a simple theft was warranted.

19. The appellant's main contention is focused on the learned Magistrate's failure to suspend the sentence. He asserts that his personal circumstances and the fact that he was a young and first offender justified imposing a suspended sentence. The Counsel for the Appellant has submitted that the Appellant has an infant daughter whose mother had deserted her and, right now, the Appellant's parents are looking after the child.

20. In ***Tuisoba v State*** HAA 0098of 2002S (28 February 2003) Justice Madam Shameem observed:

"The Appellant was not entitled to the leniency normally shown to a first offender. No items were recovered and the offence was committed when he was a security guard, a person who should be deserving of trust by all members of the community. His plea for leniency was moving and there is no doubt that his family is suffering as a result of his incarceration. It is unfortunate that offenders think so little of their families at the time they offend".

21. The same rationale applies to the Appellant's case. There is a breach of trust situation and no restitution had been done by the Appellant showing genuine remorse. It appears that the personal circumstances of the Appellant had in fact been considered by the learned Magistrate in the mitigation and also he has also not set a non-parole period. Therefore, the Appellant is entitled to be released after the minimum period of sentence prescribed under the regulations of the Department of Corrections has been served. The learned Magistrate has rightly balanced the need for rehabilitation with that of deterrence.

22. Case authorities in Fiji do not recommend imposing a suspended sentence where there is a breach of trust situation; a degree of preplanning, no restitution had been done and no genuine remorse is manifested even though the convict is a first offender. Therefore, learned Magistrate's decision to impose an immediate custodial sentence is not obnoxious to the provisions of the Sentencing and Penalties Decree or sentencing guidelines entrenched in our legal system. Therefore, any kind of interference with the sentence imposed by the learned Magistrate is not warranted in this case.

23. The sentence imposed by the learned Magistrate is neither excessive nor unreasonable. Therefore, I affirm the sentence imposed by the learned Magistrate. The appeal against sentence is dismissed.

24. 30 days to appeal to the Court of Appeal.

Aruna Aluthge
Judge

At Lautoka
24th October, 2016

Solicitors: **Office of the Legal Aid Commission for the Appellant**
Office of the Director of Public Prosecution for the Respondent